No. 89-7645

In The

Supreme Court of the United States

October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

v.

NEW YORK,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

PETITIONER'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Petitioner argued in his main brief that the prosecutor peremptorily challenged two prospective bilingual Latino jurors because of their ability to speak Spanish. The prospective jurors were asked a number of questions in the voir dire about their obligation to disregard what they might hear in Spanish from a proposed witness, and to rely only on what the interpreter would say in English. The jurors initially responded that they would try to do this, and ultimately affirmed that they would and could comply. The jurors' initial "I-will-try" responses were the result of the inherent difficulty of the task requested and were caused by the jurors' Spanish language ability. The prosecutor claimed that the jurors' initial "hesitant" responses to the questions were the reason for his exercise of peremptory challenges. The exclusion of these prospective jurors because of their Spanish-language-based "hesitancy" and thus, because of their national origin, is a per se violation of *Batson v. Kentucky*.

In response, respondent argues that there is a difference between *assuming* that all bilingual Latinos will be unable to abide by the court's instructions to accept as final the interpreter's version of the testimony, and *establishing* on the record that individual Latinos might be unable to do so. Thus, respondent attempts to make a distinction between relying on assumptions based on ethnic group traits and establishing the existence of individual traits. In Point I below, petitioner establishes that there is no such distinction in this case. Spanish language ability will cause all potential bilingual Latino jurors to respond to voir dire questions of the type asked here in a

manner similar to the two jurors in this case. There are no distinguishable individual traits discovered by that voir dire questioning, only uniformly held group traits. Thus, all bilingual Latino jurors could be excluded by simply asking the questions of the type asked here.

Nevertheless, respondent argues that a prosecutor can rely on answers to voir dire questions that are tangentially related to race or national origin as the basis of peremptory challenges. Point II of this reply brief, building on Point I, demonstrates that the jurors' responses in this case are not merely tangentially related to Spanish language but are *caused* by Spanish language ability. Thus, whatever merit respondent's arguments might have in other contexts, they are inapposite here. Moreover, to permit the prosecutor to exclude any or all prospective bilingual Latino jurors, at his whim, by eliciting uniform voir dire responses, would result in the exclusion of Latino jurors through a national origin-based classification. To use such a classification respondent must demonstrate a compelling governmental interest. Mere *speculation* that this class of jurors will not accept the English language rendition of Spanish testimony, as asserted by the prosecutor here, is not sufficient.

Point III demonstrates that the prosecutor had no basis to challenge the two jurors because of a suspicion that they would unduly influence the jury as a whole. This case presents no issue for which Spanish language "expertise" is called into play. Nor is there anything in the record to support the prosecutor's suspicion that these jurors would violate their oaths and argue to the jury that the interpreter was wrong.

Finally, Point IV demonstrates that, contrary to respondent's assertions, this Court has consistently exercised independent review in jury discrimination cases to protect inviolable constitutional values. Independent review also is warranted because of the inadequacy of the trial court's fact finding process caused by institutional constraints.

ARGUMENT

POINT I

PETITIONER HAS ESTABLISHED A PER SE VIOLATION OF THE EQUAL PROTECTION CLAUSE AND *BATSON V. KENTUCKY*

Petitioner argued in his main brief that the exercise of peremptory challenges to eliminate the two prospective bilingual Latino jurors in this case was based on the jurors' Spanish language ability and thus their national origin. Respondent agrees that challenges based on national origin or racial group traits rather than the individual characteristics of the challenged jurors would violate *Batson*. Respondent's Brief (hereinafter "R.Br.") at 24. Nevertheless, respondent argues that these jurors were struck for their individual traits. Thus, the parties join issue over whether the jurors' exclusion was caused by their Spanish language ability, a group trait, or by some individual characteristics of the two jurors.

The two jurors were asked a number of questions during the voir dire regarding proposed Spanish language testimony. Although there is no transcript, it is not disputed that, in essence, the jurors were asked if they

could separate out and reject what they would hear in Spanish from the witness and rely only on what they would hear in English from the interpreter. In the first instance the jurors answered these questions by saying that they would try. A3.[1] Ultimately, both jurors affirmed that they would accept what the interpreter said in English. A9-10. The prosecutor nevertheless peremptorily challenged them because of what he characterized as the "hesitancy" of their initial responses. A3-4.

It is evident that the jurors' initial "hesitant" responses to the voir dire questions were caused by their Spanish language ability. Even the New York State Court of Appeals recognized that the jurors' "hesitant" answers were a function of their Spanish language ability. A27-28. In fact, every honest bilingual Latino juror would exhibit the same type of "hesitant" response. The jurors were not excluded because of traits individual to them, but because of a trait shared by all bilingual Latinos, their Spanish language ability.

Respondent does not address what caused the "hesitant" responses. Rather than meet this issue head on, respondent argues:

> There is a difference between *assuming* that all persons who speak Spanish will be unable to abide by the court's instructions to accept as final the English translation of testimony given in Spanish, and *establishing* a basis in the record to suggest that individual Spanish-speakers might be unable to do so.

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[1] As in petitioner's main brief, references to the Joint Appendix will be by "A" and the page number.

R.Br. at 24 (emphasis in original) However, that distinction does not exist in this case because it is a juror's Spanish language ability that *causes* the initial "hesitancy" in answering questions about interpreters. Such "hesitancy" can always be established. All a prosecutor has to do is ask the questions: "Can you disregard everything that you hear the witnesses say in Spanish? Even if you hear something different in Spanish from what the interpreter says, can you disregard it?, etc." The bilingual jurors faced with this confusing request must then quickly consider whether they can listen to clearly understandable testimony then behave as if it had never been spoken, accepting instead a translator's rendition of what was said. Honest bilingual jurors will show some uncertainty about their ability to do this. Thus, there is no difference between *assuming* that all bilingual Latino jurors will have difficulty disregarding what they heard in Spanish and *establishing* through questions that bilingual jurors will have this difficulty. The answers to the voir dire questions do not reveal any *individual* traits of the juror. Indeed, they expose uniformly held national origin based traits.

Therefore, the central question that separates the parties is whether this national origin trait, Spanish language ability, *causes* bilingual Latino jurors to experience difficulty in completely disregarding what a witness testifies to in Spanish.[2] If it does, it is a "group" trait and cannot

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[2] This issue is a very unique *Batson* issue. As the prosecutor at the trial acknowledged, the jurors were willing to follow the court's instructions about interpreters; it was a question of whether they would be able to do this. The prosecutor said: "I

be relied upon by prosecutors in exercising peremptories. If on the other hand, the difficulty evidenced by the jurors in this case was individual to them and not universally shared by other bilingual Latinos, respondents would argue that it can be relied upon by prosecutors to the extent that they can demonstrate it exists in individual Latino jurors.[3]

As a matter of linguistics, empirical research, experience and common sense, bilingual jurors' Spanish language ability will cause them to show some uncertainty over their ability to simply disregard what they hear in Spanish from the mouth of the witness. Significantly, both jurors here exhibited what the prosecutor characterized as "hesitancy" in answering questions about the interpreter. Therefore, what the prosecutor's questions revealed was not some individual characteristic but a group trait.

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believe in their heart they [the jurors] will try to follow it [the interpreter's English language version of the testimony]" * * * "I feel very uncertain that they would be able to listen and follow the interpreter." A3. Thus, the jurors were excluded not because of any expressed unwillingness to follow the court's instructions but because of their honestly expressed difficulty to do so, caused by their Spanish language ability.

[3] It is irrelevant if jurors express different levels of difficulty as respondent suggests. ("It is likely that different individuals will have more or less difficulty in accepting the official interpretation of the testimony depending, for example, upon their relative degrees of fluency in English and Spanish." R.Br. at 27-28.) Differing responses may play some role in a court's determination whether to grant a challenge for cause; but as long as "hesitancy" is a justification for peremptory challenges, prosecutors can point to *any* level of "hesitation" to support the removal of bilingual Latino jurors.

An extensive empirical study of the issue has found that bilingual jurors have great difficulty in not registering what a witness says in Spanish.[4] The study found the Latino jurors were influenced both by what they heard in Spanish and what the interpreter said.[5] This was true even though the interpreting was accurate.[6]

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[4] Berk-Seligson, Susan, *The Bilingual Courtroom*, Univ. of Chicago Press (1990) at 167-168 (1990).

[5] *Id.* at 194 ("Clearly the impact of the interpreter is greater on non-Hispanic listeners. They must rely entirely on the English rendition of the interpreter to be able to understand a witness's testimony. Hispanic listeners do tune in to the Spanish source testimony; however, they are also to a large degree affected by the interpreter's version of the testimony as well.").

[6] *Id.* at 158-164. The study used 551 mock jurors of whom 40% were bilingual Latinos. The participants heard tape recordings of mock testimony of a single Spanish speaking witness in which the interpreter always accurately interpreted. The jurors were asked to rate the witness on the factors, inter alia, of convincingness, trustworthiness, competence and intelligence. The jurors were broken up into two groups both including Latinos and non-Latinos. One group heard a tape recording in which the interpreter would, for example, say "yes, sir" using the polite form of the witness' response, "sí, señor", while in the tape recording heard by the other group the interpreter would simply say "yes." This minor difference caused non-Latinos in the second group, relying only on the interpreter, to find that the witness whose testimony was interpreted without the politeness markers to be less convincing, less competent, less intelligent and less trustworthy than did non-Latinos in the first group who heard the interpreter's politeness markers. On the other hand Latinos in both groups of jurors, who heard the witness' original, "sí, señor", were not affected to the same degree by the interpreter as non-bilingual jurors. The Latinos in the two groups found the witness equally convincing and trustworthy. However, on the factors of competence and intelligence, the Latino jurors were obviously influenced by the interpreter;

The study's findings are consistent with both experience and common sense. Bilingual jurors cannot simply disregard what a witness' actual words are even when the interpreter does a masterful job in interpreting. They cannot shut down their Spanish language system. The jurors necessarily receive two inputs, one in Spanish and one in English. Thus, bilingual jurors, when questioned about their ability to disregard what the witness actually said and consider only what the interpreter said, have to acknowledge the difficulty of the task. The ability to separate out and disregard something heard is inherently difficult. This Court needs no empirical study to conclude that jurors may have difficulty in disregarding statements heard at a trial when instructed to do so. *See, Bruton v. United States*, 391 U.S. 123 (1968), (without citing an empirical study, Court found jury difficulty in disregarding trial testimony); *Jackson v. Denno*, 378 U.S. 368, 388-389 (1964); *id.* 378 U.S. at 402 (Black, J., dissenting in part and concurring in part) (criticizing majority finding of jury difficulty in disregarding a coerced confession because there were "no statistics . . . available, and probably none could be gathered" to support this conclusion).

It is particularly difficult for bilingual persons to separate out information based on the language in which it is heard. It has been found that when bilingual Latinos are provided information in two alternating languages, they are often unable to recall the language in which they

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those in the second group ranked the witness' testimony less favorably when the interpreter did not include the politeness markers. Thus, Latino jurors were influenced both by the witness' own words and the interpreter.

heard different parts of the information.[7] Anyone who has observed bilingual Latinos speaking with each other has noticed that they go back and forth between Spanish and English, often within the same sentence. At the end of the conversation, not surprisingly, they cannot recall in what language they learned some information.

Even when bilingual Latinos can identify differences between what is heard in Spanish and English, it is not easy to disregard the witness' own words. For example, as in the Berk-Seligson study, see *supra* at footnotes 4-6, the differences may be as slight as an interpreter not including the word "sir" as part of a witness' answer. Can bilingual jurors disregard that the juror said, "sí, *señor*"? The difference does not affect the substance of the witness' testimony but may influence a juror's evaluation of the trustworthiness of the witness. *Id.* The courts would require a bilingual juror to disregard the fact that the witness said "señor" in his or her answer, as well as more substantial variations of the interpreter's words from the Spanish language testimony. A juror faced with a question of this type will initially respond, as the jurors did in this case, "I will try."

The two bilingual Latino jurors in this case are just like every other bilingual person. They honestly acknowledged their difficulty in disregarding what they would

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[7] Magiste, *The Competing Language Systems of the Multilingual: A Developmental Study of Decoding and Encoding Processes*, 18 Journal of Verbal and Learning Behavior, pp. 79-89 (1979). See generally, Amici Curiae Brief of the Mexican American Legal Defense and Educational Fund and the Commonwealth of Puerto Rico, etc. at pp. 11-13.

hear in Spanish for what the interpreter might say, a difficulty caused by Spanish language ability, although both ultimately affirmed that they would abide by the interpreter's English version of the testimony. These jurors were excluded because they understood Spanish. If the decision below is allowed to stand, any prosecutor, with a mind to, can strike any and all bilingual Latino jurors on the same basis.

POINT II

THE RIGHTS OF LATINOS TO SERVE ON JURIES OUTWEIGH ANY INTEREST THAT THE RESPONDENT MAY HAVE IN EXCLUDING THEM

Petitioner has established the clear connection between the prosecutor's challenges in this case and the Latino jurors' Spanish language ability. *Batson* would serve little purpose if, in order to overcome a prima facie case, a prosecutor could rely on an integrally related national origin trait to explain his or her exercise of a peremptory challenge. It must be treated as a per se violation.

Respondent urges this Court to create an exception to the clear import of *Batson*. The State argues that if the juror evidences some basis for a peremptory challenge that is "tangentially related" to race or national origin, a prosecutor can permissibly exercise a peremptory challenge. See, R.Br. at 29. That argument was specifically addressed in *Batson*, which held that the unfettered use of peremptory challenges must give way to the equal protection clause. *Batson v. Kentucky*, 476 U.S. 79, 98-99 (1986). A juror's national origin cannot be the basis for a peremptory challenge.

Here the peremptory challenges were based on a group-held characteristic and not one that varies from one bilingual Latino to another. It is difficult to conceive of other traits, as integrally linked with ethnicity as language, which would have the same uniform causal relationship to a juror's responses to voir dire questions. This case is distinct from the examples and hypotheticals discussed by respondent involving African Americans. Being black does not cause all African American jurors to express doubts about the ability of white witnesses to identify African American defendants, nor to doubt the word of a witness who uses racial epithets. R.Br. at 30-31. While being black is somehow related to those kinds of juror biases, it does not uniformly cause certain types of responses to voir dire questioning.

Moreover, and of equal importance, the voir dire questioning and potential bases for peremptory challenges in the circumstances referred to in respondent's examples (i.e., where there is an issue of cross-racial identification or an issue of the credibility of a racist witness) are case specific. That is, any juror bias revealed by questioning will concern issues of contested fact at trial. On the other hand, here the peremptory challenges of bilingual Latinos based on their Spanish language ability are not case specific. Neither party has put in issue, as a question of contested fact, the meaning of specific Spanish language evidence.[8] The prosecutor's

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[8] As discussed fully in Point III, Spanish language issues can only arise when there is a dispute over the correct translation of an out-of-court statement. Similar issues are not presented by in-court statements.

challenges are akin to generalized race-based challenges of the type found impermissible by *Batson*.

Respondent's examples are also distinguishable because they involve some showing of "specific bias" or outcome determinative bias by the juror – the type of showing that is required by several state courts to demonstrate that a challenge is nondiscriminatory. See, Petitioner's Brief at Point I(D) p.25. Here, the bilingual Latino jurors would be struck without any showing of bias for the defendant or against the state. Thus, the challenges do not serve the central purpose of peremptory challenges, which is to remove persons who may not be impartial. *Holland v. Illinois*, 493 U.S. ___, 107 L.Ed.2d 905, 919 (1990).

The logical extension of respondent's position is that even if all bilingual jurors will provide "hesitant" answers to voir dire questions about the interpreter, they can all be excluded from the jury. Respondent would establish a class of bilingual Latino jurors who could be excluded anytime there is or may be testimony in Spanish. Under respondent's theory these jurors can essentially be treated as unqualified and all can be removed from juries without violating the equal protection clause. Such a position cannot withstand the strict scrutiny of the equal protection clause.

Under standard equal protection analysis, classifications based on national origin or which impinge on fundamental rights[9] must be supported by a compelling

[9] Penalizing bilingual Latino jurors based on their Spanish language ability impermissibly burdens their fundamental right to learn and speak Spanish. *See, Meyer v. Nebraska*, 262 U.S. 390 (1923); *cf. Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

governmental interest.[10] However, respondent has not demonstrated a compelling state interest in excluding bilingual Latino persons from jury service. Respondent has only stated that there is reason to suspect that this class of jurors may not disregard what they hear in Spanish.[11] The respondent must show more than ethnicity-based "speculations." *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) (even legislative speculations that Chinese merchants were failing to pay their taxes were an insufficient basis to require all ledger books to be kept only in English, Spanish or native Filipino languages); *City of Richmond v. Croson*, 488 U.S. 469 (1989) (speculations and generalized assertions of racial discrimination were insufficient to support race based classifications).[12]

[10] *Loving v. Virginia*, 388 U.S. 1 (1967); *see also, McLaughlin v. Florida*, 379 U.S. 184 (1964); *Korematsu v. United States*, 323 U.S. 214 (1944).

[11] It is assumed that all these jurors will do what they have been instructed to do despite the difficulty. *See, Bruton.*

[12] A classification based on race or national origin "bears a heavy burden of justification . . . and will be upheld only if it is *necessary*, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin*, 379 U.S. at 196 (emphasis added). However, in conducting a voir dire examination, a trial court's refusal to ask prospective jurors whether any of them spoke Spanish fluently is not an abuse of discretion. *See United States v. Gonzalez-Benitez*, 537 F.2d 1051, 1053 (9th Cir. 1976) (Kennedy, J., writing for the court), *cert. denied*, 429 U.S. 923 (1976). Therefore, the use of peremptories based on such discretionary information cannot rise to the level of a compelling state interest.

Latinos by virtue of their language may not be excluded at the whim of the prosecutor because as this Court has stated:

> [I]t denies the class of potential jurors the "privilege of participating equally . . . in the administration of justice," . . . and it stigmatizes the whole class, even those who do not wish to participate by declaring them unfit for jury service and thereby putting "a brand upon them, affixed by law, an assertion of their inferiority."

Peters v. Kiff, 407 U.S. 493, 499 (1972) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

Respondent's position is particularly suspect because there is a nondiscriminatory alternative to the exclusion of bilingual jurors. *See, City of Richmond v. Croson*, 488 U.S. at 507. Respondent's concern could be addressed by allowing any disputes over the correct interpretation to be resolved by the judge. It is a procedure that is currently used in the New York courts. *See, Santana v. New York City Transit Authority*, 132 Misc. 2d 777, 505 N.Y.S.2d 775 (N.Y. Sup. Ct. 1986).[13]

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[13] Respondent speculates that these two jurors might not go to the judge with disputes and therefore this practice would not have answered the prosecutor's concern. However, there is nothing in the record to support such speculation. The jurors were not asked whether they would or could follow an instruction of this type. Certainly Spanish language ability does not create difficulty in complying with this instruction, as it did with the instructions at issue. These jurors evidenced no specific or general unwillingness to comply with the rules of the Court. Respondent must show more than a mere non-record-based speculation to establish that this alternative would not be effective.

Therefore, under traditional equal protection analysis, all bilingual Latino jurors may not be excluded from jury service even if all of them give "hesitant" responses to voir dire questions about following the interpreter. No compelling state interest is served by their exclusion.

POINT III

ISSUES OF UNDUE JUROR INFLUENCE ARE NOT PRESENTED BY THIS CASE

The court below found that the prosecutor's neutral reason for the exclusion of the two bilingual Latino jurors was his belief that the jurors would not follow the interpreter. A31. Respondent argues in addition that the two Latino bilingual jurors were peremptorily challenged because they would have an undue influence on the jury as a result of their expertise in the Spanish language. However, this case does not involve an issue in which Spanish language expertise plays a role. Nor is there anything in the record to support respondent's assertion.

Only when the prosecution and the defense offer conflicting translations of out-of-court statements does an issue involving Spanish language expertise arise. In such cases, after listening to the tape recording of the out-of-court statement in Spanish, reviewing the disputed versions of the translations, and hearing the testimony of the persons who translated it, the jury would decide as matter of fact what was said. *See e.g., United States v. Zambrana*, 841 F.2d 1320, 1335-1339 (7th Cir. 1988); *United States v. Carbone*, 798 F.2d 21, 26 (1st Cir. 1986); *United States v. Llinas*, 603 F.2d 506, 509-510 (5th Cir. 1979), *cert. denied*, 444 U.S. 1079 (1980). A bilingual juror might have greater influence than non-bilingual jurors in persuading

the jury as to the meaning of the disputed Spanish language statement. Only in this limited situation would the juror's language expertise come into play.

This case involved proposed in-court testimony in Spanish. There was no issue presented that required Spanish language expertise. It is unlike respondent's examples of doctors serving as jurors in cases with complex medical issues, or psychiatrists where there are claims of insanity, or accountants in tax-evasion cases. Moreover, this is unlike *State v. Pemberthy*, 224 N.J. Super. 280, 540 A.2d 227, *appeal denied*, 111 N.J. 633, 546 A.2d 547 (1988 where the translation of out-of-court statements was at issue. *And see, United States v. Alcantar*, 897 F.2d 436 (9th Cir. 1990).

Nevertheless, respondent speculates that one or both of the excluded Latino jurors would argue to the other jurors that a witness said something in Spanish that was different from the interpreter's rendition. There is nothing in the record that could support such a suspicion. The jurors' voir dire statements only indicated an apparent difficulty in separating out what they may hear in Spanish and relying on only what they hear in English. This difficulty should not be taken as an indication of a general unwillingness on the part of the jurors to follow the court's instructions, as the prosecutor would have us believe. The record does not show that jurors were asked whether they could refrain from arguing to the jury that a witness' testimony differed from what the interpreter said. Nor does the record show that the jurors were hesitant in response to questions about this instruction. The prosecutor cannot assume that because a juror's Spanish language ability may cause some difficulty in

following one court rule, that he or she will in all instances not follow the court's instructions.

Thus, respondent's argument is nothing more than an unfounded speculation that these jurors would violate their oaths and seek to persuade the jury that the interpreter is wrong. None of the courts below relied on this suspicion in their findings.

POINT IV

THE ULTIMATE DETERMINATION OF THE CONSTITUTIONALITY OF THE VOIR DIRE MUST BE INDEPENDENTLY REVIEWED TO PRESERVE EQUAL PROTECTION VALUES FUNDAMENTAL TO OUR DEMOCRATIC SOCIETY AND TO ENSURE THE APPEARANCE AND REALITY OF JUSTICE

In order to ensure a racially unbiased criminal justice system, this Court should assign the ultimate question of the constitutionality of the voir dire process to the independent judgment of the appellate courts. Independent review requires the appellate court to accept the findings of historical fact and credibility of the lower court unless they are clearly erroneous. Then, based on these facts, the appellate court independently determines whether there has been discrimination. Contrary to the respondent's assertions (R.Br. at 42), this Court has consistently provided independent review in jury discrimination cases. As this Court clearly explained in *Cassell v. Texas*, 339 U.S. 282, 291-292 (1949):

> A claim that the constitutional prohibition of discrimination was disregarded calls for ascertainment of two kinds of issues which

ought not to be confused by being compendiously called "facts." The demonstrable, outward events by which a grand jury came into being raise issues quite different from the fair inferences to be drawn from what took place in determining the constitutional question: was there a purposeful non-inclusion of Negroes because of race or a merely symbolic representation, not the operation of an honest exercise of relevant judgment or the uncontrolled caprices of chance?

This Court does not sit as a jury to weigh conflicting evidence on underlying details, as for instance what steps were taken to make up the jury list, why one person was rejected and another taken, whether names were picked blindly or chosen by judgment. This is not the place for disputation about what really happened. On that we accept the findings of the State court. But it is for this Court to define the constitutional standards by which those findings are to be judged. Thereby the duty of securing observance of these standards may fall upon this Court. *The meaning of uncontrovertible facts in relation to the ultimate issue of discrimination is precisely the constitutional issue on which this Court must pass.*

Id. (citation omitted) (emphasis added). Thus, the responsibility for determining the ultimate question of jury discrimination has consistently been resolved by the independent review of the appellate courts.

This is precisely the same allocation of judicial functions traditionally required in other instances where there is an overriding need to protect constitutional values that safeguard not only the rights of the immediate parties, but the very tenets of our democratic system, *e.g.*, *Harte-Hanks Communications Inc. v. Connaughton*, 491 U.S.

___, 105 L.Ed.2d 562, 589 (1989) ("In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of witnesses,' the reviewing Court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' ") (quoting *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499-500 (1984) and *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)); *Miller v. Fenton*, 474 U.S. 104, 112 (1985) (while subsidiary facts are to be given the presumption of correctness, "the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirement of the Constitution is a matter for independent federal determination."); *cf. Maggio v. Fulford*, 462 U.S. 111, 118 (1983) (White, J., concurring). Respondent does not even address the import of these cases.

Because a racially unbiased criminal justice system is an unalterable prerequisite to a truly democratic and just society, independent review should be maintained in all jury discrimination cases. "The basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries.' " *Batson*, 476 U.S. at 84 n.3 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 626 n.3 (1972)). The standard of review should also be the same.

In addition to the constitutional reasons for independent appellate review, there are the institutional problems that interfere with the proper resolution of *Batson* issues at the trial level. As stated by Justice Mosk of the California Supreme Court:

> Even the most conscientious trial judge can be misled by such extraneous pressures as a reluctance to dismiss the venire after some or all of the jurors have been seated, or a felt urgency to begin taking testimony in a trial expected to be lengthy, or a natural disinclination to disbelieve assertions of good faith made by an attorney in open court. An appellate court, of course, is removed from such pressures.

People v. Johnson, 47 Cal. 3d 1194, 1291, 767 P.2d 1047, 1105, 755 Cal. Rptr. 569, 627 (1989) (Mosk, J., dissenting), *cert. denied*, 110 S. Ct. 1501 (1990

Contrary to respondent's assertions, independent review is essential to prevent *Batson*'s promise of justice from being transformed into the legacy of failure realized in *Swain v. Alabama*, 380 U.S. 202 (1965).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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